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In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

THE W. E. WRIGHT COMPANY,
Petitioner,
against
WILLIAM R. McCOMB,
Administrator of the Wage & Hour Division,
United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED.

This case involves two questions under the Fair Labor Standards Act of 1938[1] (hereinafter called the "Act"): First, the scope of the "retail establishment" exemption contained in Section 13 (a) (2), and, second, the application of the principle "de minimis non curat lex" to Section 7 (a).[2]

The facts in this case have been stipulated (R. 5-18) and may be summarized as follows:

The petitioner deals in bulky commodities, being engaged in a general building, garden and household supply and coal business (R. 6) in Akron, Ohio purchasing 14.28 per cent in dollar volume of its supplies from sources out-

[1] Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. 201 et seq.

[2] Sections 7 (a) and 13 (a) (2) of the Act are set forth in the Record at pp. 19-20.

side Ohio (R. 15) and making all of its sales in Ohio (R. 6). Its gross annual sales somewhat exceed $1,000,000.00 (R. 15), which gross sales are made up of individual sales averaging less than $58.00 each (R. 15) and are, to the extent of 79 percent (R. 17), "retail sales" within the interpretation of Wage and Hour Division Interpretative Bulletin No. 6 (R. 16-18). This percentage would make the amount of non-retail business transacted by the petitioner insubstantial (R. 21).

The petitioner was organized in 1907 and commenced business at 451 South Main Street, Akron, Ohio (R. 13). Until the 1920's it made all of its deliveries by horse and wagon (R. 14). Between the time of its organization and its conversion to motor-truck delivery, petitioner acquired six branch yards, at each of which it carried a representative supply of each commodity in which it dealt (R. 14). The central yard and offices at South Main Street and South High Street served to supply the downtown Akron area while the others served the outlying areas by being located in respect to the central yard, two miles to the southeast (R. 11), five miles to the south (R. 12), three miles to the southwest (R. 12), seven miles to the west, five miles to the northwest and seven miles to the north (R. 14).

Following its conversion to motor-truck delivery, petitioner expanded as best it could (considering the built-up character of the surrounding area) its central yard and promptly sold three of its outlying yards (R. 14) and, since this suit has been instituted, has sold and abandoned yet a fourth (R. 7). The petitioner no longer follows the policy of carrying a representative supply of each of its commodities at each branch (R. 14). Petitioner's business is not segregated between its yards and warehouses. Orders are taken directly from customers and sales are made directly to customers at all of petitioner's facilities listed on page 7 of the Record except the East Exchange Street yard (R. 12). An order accepted at one facility is either filled from the supplies there stored or routed to such

other facility as has the ordered supplies on hand (R. 16). At least ninety-eight per cent of petitioner's sales are made from supplies in stock at one facility or another (R. 18). There is no apparent correlation between the volume of orders accepted by any one facility of the petitioner and the volume of orders filled from the inventory of such facility (See opposing tables, R. 16). A reading of the whole stipulation (R. 5-18) indicates that none of the physically separated facilities of the petitioner has a standing independent of petitioner's business as a whole.

The facts relating to the only employees of the petitioner claimed by Administrator to come within the coverage of the Act are as follows: Certain warehouse and yard employees of the petitioner "regularly spend twenty-five (25) per cent of their time in unloading and storing both interstate and intrastate shipments of goods * * * of this time, approximately one-half (½) is devoted to unloading operations and one-half (½) is devoted to storage operations." (R. 8) It being conceded that only 14.28 per cent in dollar volume of petitioner's goods are received by way of interstate shipment (R. 15, col. 3, table), it is apparent that only a very minor percentage of these employees' time is spent "in commerce."

PROCEEDINGS IN THE COURTS BELOW.

This action was brought by the Administrator to enjoin the petitioner from continued violations of the Act.

The District Court dismissed the complaint for the reasons stated in its Memorandum Opinion (R. 18-25).

The Circuit Court of Appeals on May 24, 1948 reversed the judgment of the District Court on the theory that the employees in question were "in commerce" to a substantial degree and that the case of *A. H. Phillips, Inc. v. Walling*, 324 U. S. 490 was controlling on the question of the "retail establishment" exemption.[3]

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[3] See Opinion at pp. 37-41 of Transcript of Record. The decision is reported at 168 Fed. 2d 40.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

A. The Scope of the "Retail Establishment" Exemption.

It is our contention that the decision of the Court of Appeals is an unwarranted extension of the rule of *A. H. Phillips, Inc. v. Walling*, 324 U. S. 490.

It is to be noted that 79 per cent of petitioner's total sales in dollar volume are "retail sales" as defined in Wage & Hour Interpretative Bulletin No. 6 (R. 17). Paragraph 18 of the Bulletin[4] provides in effect that where less than 25 per cent of gross receipts result from "non-retail" sales, the 13 (a) (2) exemption will not be defeated by such "non-retail" sales if the exemption otherwise applies.

The *Phillips* case involved a chain store operation: 49 retail outlets in two states, all of which were backed by a central office and warehouse, the latter performing the same function as that performed by the independent grocery supply house. It was held that the "retail establishment" exemption should not extend to the central office and warehouse.

As we read the *Phillips* decision the rationale is contained in four statements. To point up the distinctions between the *Phillips* case and the instant controversy, we submit the following:

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[4] "18. The foregoing discussion indicates the principal attributes of a retail establishment for purposes of section 13 (a) (2). Minor discrepancies, of course, will not defeat the exemption. Major variations from the pattern, however, do indicate that the exemption is inapplicable. Thus, for example, an establishment which makes some nonretail sales nevertheless would be considered a retail establishment if the gross receipts from nonretail sales are not substantial in relation to the total gross receipts of the establishment. For purposes of enforcement the Administrator will ordinarily consider the nonretail selling of an establishment to be substantial if the gross receipts from such selling constitute more than one-quarter (25 percent) of the total gross receipts of the establishment."

The Phillips Case	*The Instant Case*
1. "The independent wholesaler or distributor has beeen eliminated from the channel of petitioner's merchandise." (p. 494.)	1. There has been no wholesaler or middleman eliminated.
2. "They" (warehouse and central office) "are necessary instruments in the performance of the wholesale aspects of a multi-function business of this type." (p. 494.)	2. No coal and building-supply business can operate without extensive yard and warehouse storage areas. The retail character of petitioner's overall business rather than the nomenclature of its various units should control in this case.
3. "In a realistic sense, therefore, most chain-store organizations are merchandising institutions of a hybrid retail-wholesale nature. They possess the essential characteristics of both the wholesaler and the retailer. Their wholesale functions, which are integrated with but which are physically distinct from their retail functions, are performed through their warehouses and central offices. That fact is the essential key to the problem presented by this case." (p. 495.)	3. No wholesale function explains the existence of petitioner's yards and warehouses. Their reason for being lies in the bulk of the commodities in which petitioner deals. Petitioner's present-day, truck-delivery operations could be more economically conducted from one central location, but practical difficulties arising out of petitioner's early corporate history make this economically impossible (R. 13-14).
4. "We fail to perceive in Section 13 (a) (2) or in its congressional background any intent to discriminate against chain store employees engaged in wholesale activities or to give to chain store warehouses a competitive advantage over independent wholesalers." (p. 496.)	4. The decision of the Court of Appeals confers coverage by the Act on certain employees of the petitioners solely by virtue of their employment in warehouses or yards. The decision results in placing the petitioner at a competitive disadvantage with other retailers in the same business but of more recent origin and whose facilities are centrally located.

The reasoning of *A. H. Phillips, Inc. v. Walling* should not be extended beyond the specific facts of that case. Employees in a warehouse are not, by reason of that fact alone, within the coverage of the Act.

Montgomery Ward & Co. v. Antis, 158 F. (2d) 948, 951, certiorari denied, 331 U. S. 811;

Walling v. Goldblatt, 152 F. (2d) 475, certiorari denied, 328 U. S. 854.

B. De Minimis Non Curat Lex.

The Supreme Court has held in *Walling v. Jacksonville Paper Co.,* 317 U. S. 564 at p. 571 that an employee must spend a "substantial" part of his time in activities related to goods in commerce before such employee comes within the coverage of Section 7 (a) of the Act. From this holding it is clear that the *"de minimis"* maxim has application to the Act. It is, however, important that the meaning of "substantial" be clarified by a decision in a case involving a precise and minor percentage. The Supreme Court in *Mabee v. White Plains Publishing Co.,* 327 U. S. 178, has passed on a Section 15 (a) (1) case involving a precise percentage, but there is a wide difference between the language in Sections 7 (a) and 15 (a) (1).[5]

In ascertaining the percentage of the employee's time spent in interstate commerce the Court of Appeals has applied the decision of *Montgomery Ward & Co. v. Antis* (C. C. A. 6), 158 F. (2d) 948, certiorari denied, 331 U. S. 811 and has determined that 3.57 per cent of his time was spent in commerce. *Montgomery Ward & Co. v. Antis* holds at page 951 that both the unloading and storage operations connected with warehousing goods received from outside the state are in interstate commerce. In this holding, that decision is in conflict with *Walling v. Goldblatt* (C. C. A. 7), 128 F. (2d) 778, certiorari denied,

[5] For discussion of the difference between Sections 7 (a) and 15 (1), see *Skidmore v. Casale,* 160 F. (2d) 527, 530, certiorari denied, 331 U. S. 812.

318 U. S. 757, where it was held (p. 782) that the interstate journey ended on the warehouse platform. If the holding in the latter case is applied, the employees in the instant case spent but 1.785 per cent of their time in commerce.

The *de minimis* maxim should be applied to this case.

Walling v. Jacksonville Paper Co., supra;
Fainblatt v. N. L. R. B., 306 U. S. 601;
Skidmore v. Casale, supra;
Goldberg v. Worman, 37 F. Supp. 778;
Gerdert v. Certified Poultry Co., 38 F. Supp. 964;
Rauhoff v. Henry Grambling & Co., 42 F. Supp. 754;
Zehring v. Brown Materials Ltd., 48 F. Supp. 740;
Kron v. Goodyear Tire & Rubber Co., 49 F. Supp. 1013;
Fellabaum v. Swift & Co., 54 F. Supp. 353;
Sapp v. Horton's Laundry, Inc., 56 F. Supp. 901;
Cody v. Dossins Food Market (D. C. Mich.), 8 Wage & Hour Rep. 989;
Hill v. Jones, 59 F. Supp. 569.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of the United States District Court for the Northern District of Ohio, Eastern Division be made final; and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

EDWIN W. BROUSE,
ROBERT C. BROUSE,
Counsel for Petitioner.

FILE COPY

No. 281.

In the Supreme Court of the United States

OCTOBER TERM, 1948.

THE W. E. WRIGHT CO.,
Petitioner,

v.

WILLIAM R. McCOMB,
Administrator of the Wage and Hour Division,
United States Department of Labor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

STATEMENT IN SUPPORT OF THE FACT THAT PETITION FOR WRIT OF CERTIORARI WAS FILED WITHIN THE PRESCRIBED TIME.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 9647

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

STATEMENT IN SUPPORT OF THE FACT THAT PETITION FOR WRIT OF CERTIORARI WAS FILED WITHIN THE PRESCRIBED TIME.

Counsel for the petitioner in the above entitled matter submit the following in support of the contention that the petition for writ of certiorari was filed within the time prescribed by 28 U. S. C. § 350.

On May 25, 1948, by mail from Cincinnati, Ohio, there came to the desk of Robert C. Brouse a printed copy of the opinion of the United States Circuit Court of Appeals for the Sixth Circuit in this cause. This opinion, dated May 24, 1948, did not reflect the fact that a judgment had been entered.

On May 26, 1948, an examination was made of the Rules of the aforementioned Circuit Court of Appeals and the statute bearing on the question of the right of review by a petition for writ of certiorari (28 U. S. C. § 350). The

statute was clear. The Rules contained no provision indicating that the date of the opinion had significance for purposes other than the commencing of the period during which a rehearing might be requested (Rule 28). The subject of judgment is referred to in the aforementioned Rules only at paragraph 3 of Rule 26, reading as follows:

> "3. When the court is not sitting, opinions and orders for judgment may be filed with the Clerk and announced on any Monday of the term exclusive of holidays."

It is to be noted that the opinion did not contain an order for judgment.

On June 30, 1948, A. A. Caghan, Esquire, of Cleveland, Ohio and Regional Attorney for the United States Department of Labor, Wage and Hour Division, notified counsel for petitioner by telephone that he had learned that an order had been filed with the United States District Court for the Northern District of Ohio, Eastern Division, and that since this order had not been preceded by any action on our part, he assumed that no petition for writ of certiorari was to be filed. Since our views on the time limitations involved were different from those of Mr. Caghan, his call was the occasion for a review of our previous conclusions on the subject.

A telephone call was immediately placed to the Clerk of the aforementioned District Court. A deputy clerk was requested to read the document received from the Circuit Court of Appeals to a stenographer, and this was done. It was transcribed from shorthand and we then had before us the material set forth in the Supplement to Transcript of Record.

Based upon the clear language of the fourth paragraph of the mandate (page 1, R. Supp.) the absence of knowledge of any prior order, the provisions of Rule 30 of the Rules of the United States Circuit Court of Appeals for the Sixth

Circuit* and further review of 28 U. S. C. § 350, we came to the clear conclusion that the rule day for filing the petition for writ of certiorari was September 24, 1948.

Our conclusions on this subject were brought to the attention of Mr. Caghan in the course of telephone conversations on July 2, 1948 and July 7, 1948 and again in the course of a conference in his office in Cleveland, Ohio, on July 13, 1948. During these conferences we also discussed the terms of the judgment to be entered by the District Court and the supersedeas bond to be filed by petitioner pending the action of the Supreme Court of the United States on the petition for writ of certiorari, and we further discussed the necessity of including in the Transcript of Record the proceedings in the District Court subsequent to the opinion and mandate of the Circuit Court of Appeals.

On September 2, 1948, we, counsel for petitioner, received telephone advice from E. P. Cullinan, Esquire, of the office of the Clerk of the Supreme Court of the United States, that while the Clerk was in receipt of the Petition and the Transcript of Record, the rule day had expired on August 24, 1948. We then prepared the Supplement to Transcript of Record. All three documents were filed on September 16, 1948.

It is true that the Record (page 35) discloses a docket entry of judgment dated May 24, 1948, but this entry was not brought to our attention. Perhaps it can be said that

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* "30

"MANDATE

"Mandate shall issue at any time after thirty days from the date of the decision, unless an application for rehearing has been granted or is pending. If such application is denied the mandate will be stayed for a further period of five days. No further stay will be granted unless applied for within the delay given above. A mandate once issued will not be recalled except by order of the court or one of the judges. A copy of the opinion of this Court shall accompany the mandate; the charge for such copy shall be taxed in the costs of the case."

a search of the records in Cincinnati, Ohio, would have disclosed this entry, but we wish to submit the following:

First: The clear language of the mandate indicates that the judgment of the District Court was reversed on June 24, 1948, and no reference is made to the action taken on May 24, 1948. In view of the language "it is now here ordered, * * *" contained in the mandate, we do not believe it is reasonable to expect counsel to make special inquiry of previous and unknown docket entries.

Second: While the Rules of the Circuit Court of Appeals for the Sixth Circuit warn against the issuance of the mandate, they give no warning against the issuance, without notice to counsel, of a judgment such as was entered in this case.

We submit that the rule date in this cause was September 24, 1948. As authority for this submission, we cite the case of *Commissioner of Internal Revenue v. Bedford*, 325 U. S. 283.

Respectfully submitted,

EDWIN W. BROUSE,
ROBERT C. BROUSE,
Counsel for Petitioner.

JURAT.

STATE OF OHIO,
SUMMIT COUNTY, ss.

Robert C. Brouse, being first duly sworn, deposes and says that he is one of the counsel for the petitioner in this cause, and that each of the averments of fact (as distinguished from the argumentative assertions) in the foregoing Statement are within his personal knowledge and are true.

ROBERT C. BROUSE.

Sworn to before me this 14th day of October A.D. 1948.

MARY JEAN BECHERER,

Mary Jean Becherer,
Notary Public in and for
Summit County, Ohio.